2011 WL 7464622 (Mich.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Michigan.
Wayne County

Heather RAMEY-MARSH, Plaintiff,

v.

Christopher PESTA and CLASSIC CONSTRUCTION, INC. a Domestic Profit Corporation, Defendants.

No. 09-027297-CK.
June 13, 2011.

Plaintiff's Response to Defendants' Motion for Summary Disposition

The Rasor Law Firm, James B. Rasor (P43476), Attorney for Plaintiff, 321 S. Williams Street, Royal Oak, MI 48067, (248) 543-9000.

George Dean (P49542), Attorney for Defendants, 407 E. Grand River Ave., Howell, MI 48843, (248) 921-5098.

Kallas & Henk, P.C., Michael C. O'Malley (P59108), Co-Counsel for Defendants, 43902 Woodward Avenue, Suite 200, Bloomfield, Hills, MI 48302, (248) 335-5450.

Factual Summary

On or about April 9, 2008, Plaintiff Heather Ramey-Marsh (“Plaintiff”) entered into a contract according to which Classic Construction, Inc. (“Classic Construction”) and Christopher Pesta (“Pesta”) (collectively, “Defendants”) were to construct a second story addition to Plaintiffs residence located at 12791 Rosedale, in the City of Southgate, Michigan. The total contract price was $141,800.00.

In the course of construction, however, Plaintiff fired Defendants because she became aware that the work being done was faulty, not to code, and creating a dangerous situation by rendering her home structurally unsound.

Indeed, several very serious problems with Defendants' work were noted by the city inspector, Robert Casanova. For example, Defendants had cut support beams in the Heathers' home, making the residence structurally unsound:

TABLE

Defendants also failed to install the electrical wiring to code, sending it through the wooden beams and leaving the premises unsafe:

TABLE

Defendants failed to complete the work to code, caused serious structural damage to the residence, failed to properly repair the damages to the residence once the damage was discovered, failed to complete the work in a timely manner and failed to clean up and haul away unused materials.

Plaintiff clearly indicated through a letter to Defendants that Defendants were being terminated because of the faulty work they performed on her home which caused significant damage, as well as Defendants' demands for amounts not yet due under the contract. *See* Letter, Exhibit A hereto, and Transcript of Deposition of Heather Ramey-Marsh, Exhibit B hereto at p.56.

Indeed, as Plaintiff testified, prior to Plaintiff firing Defendants, Defendants' faulty work had caused significant and extensive damage to her home:
Q. When you reference -- you indicated that you did not wish to continue doing business and you were terminating the contract in this letter; is that correct?

A. Yes.

Q. Okay.

Q. And you indicated that you didn't want to continue to do business due to damages incurred in your home. What were the damages that you're aware of at that time?

A. The water damage that was occurring on the new addition which was causing the sub floor to bubble and lift. It was also -- one of Mr. Pesta's workers, Ben Baksic, I believe it was, came over and saw the damage that was during rain, a couple of rain storms that we had. Rain was pouring through my recessed lighting in my dining room and family room. It was coming through all over the place which resulted in the drywall -- my paint was bubbling out on my walls, the drywall was bubbling out. My ceiling in my kitchen was plaster so it was just one big bubble of water that we basically had to poke to relieve some of the water. My lights were going out because they were getting shorted out by the water. I was concerned with it.

Id.

Plaintiff also testified that her reasons for firing Defendants included the fact that his workers were coming to her and telling her that Defendants had not been paying them, that she had discovered that Defendants had cut through support beams in the Plaintiffs home making the residence structurally unsound, that Defendants had destroyed her pool requiring it to be replaced, and that Defendants had created a fire hazard by sending electrical wires through the wooden beams leaving the premises unsafe. Exhibit B at pp.35-40, 46, 55-56, 65.

At that point, as Defendants agree, Plaintiff had already paid Defendants at least $72,000 of the contract amount. *See* Exhibit C, Transcript of Deposition of Christopher Pesta at p. 74. However, much of the work that was performed was destroyed due to Defendants' negligence, or otherwise faulty, and had to be replaced or repaired.

Indeed, as a result of Defendants' faulty worksmanship and negligence, Plaintiff has had to tear out and replace much of Defendants' work, including the staircase, 80% of the flooring on the second floor, the window sills, the living room must be patched and re-drywalled, supports for the basement must be re-installed, among other issues. Exhibit B at pp.35-40. Plaintiff has supplied ample proof of the damages she has incurred as a result of Defendants' faulty work on home. Ex. D hereto.

Moreover, as a result of Defendants' faulty work, she has had to replace her pool when it was destroyed by Pesta's roofer to the tune of $3,007.89 not including installation:

TABLE

Also as a result of Defendants' faulty work, Plaintiff has had to pay $13,600 in rent for her aunt who lives with her while she had Defendants' dangerous and faulty work corrected:

TABLE

Plaintiff has testified that the faulty work was performed by Defendants and/or their subcontractors, including the faulty electrical work which posed a fire hazard, the faulty plumbing work, and that the unsafe and faulty issues with Defendants' work were repaired by new contractors. Ex. B at pp.70, 76-77, 82-86. As Plaintiff testified, much of the work that was finished needed to be repaired and replaced, and much still remains to be completed:
Q. (BY MR. DEAN): And then what are the items that need to be finished still?

A. The dry vanity area is not finished, the closet's not finished, there is no stairs to the attic, the master bathroom is incomplete, the --

Q. How is it incomplete?

A. It's not tiled, there's no vanity, no mirrors, no lighting, no fan, no flooring other than the sub-floor, no paint, no window sills, no trim.

Q. Okay.

A. No doors.

Q. And what else needs to be completed?

A. The stairway has to be completely ripped out because the inspector had told me that the windows at the end of the stairs should have been removed before the staircase even was put in, so the windows need to be removed, the stairs need to be rebuilt, that wall will need to be drywalled. There was supposed to be a closet underneath the stairs, that will have to be drywalled and built. The outside where the window is removed will have to be stoned to match, bricked, stoned. That will have to go on the outside of the house to match the rest of the house. There's a second set of gutters that still need to go up on the outside of the house. The living room needs to be patched and re-drywalled, as you can see, around the windows. As you can see in picture number 23, this is incomplete. That was plastered with -- the coves. It needs to be plastered around the top, drywalled, repainted. My kitchen has the stress cracks from the weight of water damage that is not completed. There's holes in the ceiling that they had to drill through to get to support the beams. The plumber, the original plumber cut through -- going down into my basement he cut a very large -- two holes in the wall that are going do need to be re-drywalled and painted. My basement ceiling had to be ripped out because there was no support whatsoever.

Q. The basement ceiling?

A. Yes. Mr. Casanova wanted -- I don't know what it's called -- it was like a support that had to be put into the basement ceiling to give it extra support. It had to be done so they had to rip out the basement ceiling and they had to put these wooden beams in.

Q. Was that a problem with the original housing or was that a problem with the second story?

A. No, the second story.

Ex. B at pp. 40-41.

City of Soutfigate

DEPARTMENT OF BUILDING AND SAFETY ENGINEERING

14400 DIX-TOLEDO ROAD SOUTHGATE MICHIGAN 48195

734.258.3030

FAX 734.281.6670

September 25 2008

Rasor Law Firm

John Tones

500 Washington Ave

Royal Oak MI 48067

Dear Mr Tones

This letter is in response to our phone conversation on September 18 2008 regarding Heather Ramey and the second story addition at her residence located at 12791 Rosedale. On July 18 2008 the Southgate Building Department was notified in writing by Heather Ramey that she had fired Classic Construction.

On September 2008 did walk through of the addition as requested by Ms Ramey. During that walk through there were items that appeared to need corrections One was the blocking under the micro lam bearing on the east existing exterior wall. The west end of the micro lam also appears to be bearing on the floor sheathing and not transferring the load to the first floor floor joist. The ceiling in the basement may have to be removed to insure proper blocking under this bearing point. Also it was noticed that the floor trusses had blocking in the middle of the span and they were not bearing at the correct locations.

Since that time the truss manufacturers engineer has approved the location of the bearing walls in respect to the truss bearing point. The Building Department is still waiting for the truss manufacturers recommendation on the installation of HVAC unit in the roof trusses to insure structural stability. Other concerns during the walk through were the nail plates that were cut on several floor trusses near the new plumbing and the lack of proper nailing of the addition floor sheathing

Again let me reiterate that this walk through was requested by the homeowner Ms Heather Ramey and not called for by the permit holder Classic Construction. If you have any questions feel free to call me at 734-258-3030

Robert Casanova

Building Inspections Director

Ex. E hereto.

Plaintiff also testified that the water damage to her home that was caused by Defendants' faulty work occurred prior to, or just at the time that she terminated the contract with Defendants. Ex. B at p. 89. Indeed, the water damage was caused by Defendants' failure to properly nail down Tyvek material to protect Plaintiffs home from rain. *Id.* at pp. 89-91. Plaintiffs homeowner's insurance company inspected the water damage and confirmed that it was the result of Defendants' faulty and negligent work

in failing to properly secure the home from damage due to water while construction was ongoing. As such, Plaintiffs insurance company denied her claim for benefits under her insurance policy. Ex. F hereto.

As such, Plaintiff has been able to blackboard at least $45,545.53 for the work that had to be repaired and replaced (Exhibit G hereto, Report on Costs), plus $13,600 for the rent to be paid for her aunt who could not live in the home due to its lack of structural integrity, plus $3,007.89 for the pool that had to be replaced, plus at least $95,990.00 to finish the job. Exhibit H hereto.

Furthermore, Defendants had not paid its subcontractors for the work on Plaintiffs' home, as confirmed in writing by at least one subcontractor, L&M Royal Air. In order to avoid liens on her home and to have the work completed, Plaintiff had to pay this subcontractor herself:

December 1, 2008

TABLE

Ex. I hereto.

Plaintiff also testified that she treated with a psychologist due to the stress she endured due to Defendants' actions, given that her home was severely damaged, which had a major impact on her life. Ex. B at pp. 130-131. Indeed, Plaintiffs aunt who was supposed to live with her in the addition to be built by Defendants died, which Plaintiff testified she believed would not have happened if her aunt had been able to live with her. Ex. B at pp.133-134.

ARGUMENT

A motion for summary disposition should only be granted when, except in regard to the amount of damages, there is no genuine issue in regard to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10); *Veenstra v. Washtenaw Country Club,* 466 Mich. 155, 164; 645 NW2d 643 (2002). In deciding a motion for summary disposition, the trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. *Brown v. Oliver/Hatcher Const. & Development,* Co. 2004 WL 243420, 1 (Mich.App.,2004).

I. There Is An Issue Of Material Fact With Respect To Which Party Was First In Material Breach.

Here, construing the facts in the light most favorable to Plaintiff, there is a clear issue of fact with respect to whether Defendants were the first to be in material breach of contract, which relieved Plaintiff of any obligation to Defendants under the contract.

Indeed, as set forth herein, during the course of construction, it became clear to Plaintiff that Defendants' work was faulty and causing damage to her home. Specifically, Plaintiff saw that the house was not properly secured from water intrusion and that the water damage to her home was so bad that rain was pouring through her recessed lighting, the paint was bubling on her walls and the drywall and plaster was bubbling as well:
Q. When you reference -- you indicated that you did not wish to continue doing business and you were terminating the contract in this letter; is that correct?

A. Yes.

Q. Okay.

Q. And you indicated that you didn't want to continue to do business due to damages incurred in your home. What were the damages that you're aware of at that time?

A. The water damage that was occurring on the new addition which was causing the sub floor to bubble and lift. It was also -- one of Mr. Pesta's workers, Ben Baksic, I believe it was, came over and saw the damage that was during rain, a couple of rain storms that we had. Rain was pouring through my recessed lighting in my dining room and family room. It was coming through all over the place which resulted in the drywall -- my paint was bubbling out on my walls, the drywall was bubbling out. My ceiling in my kitchen was plaster so it was just one big bubble of water that we basically had to poke to relieve some of the water. My lights were going out because they were getting shorted out by the water. I was concerned with it.

Ex. B at p. 56. Moreover, Defendant Pesta admitted that there were at least two rainfalls while he was working on Plaintiffs home and that he could not get the property secure. Indeed, Defendant Pesta testified that he believed the rain damage was not a big deal and that Plaintiff should have simply moved out of her house and that way she wouldn't have been as “bothered” by the rain damage:
Q. She was unhappy with you?

A. I think she was unhappy with the whole situation. She was unhappy that she had gotten some rain in. You know, it could have been avoided if she would have moved out.

Q. Well, she still would have gotten rain in her house if she moved out --

A. Exactly.

Q. -- the only difference is she wouldn't have known about it.

A. No, it wouldn't have been an inconvenience for her. The inconvenience was that she thought her TV was going to get wet or this was going to get wet. You know, had plastic down. I mean, it was an inconvenience for her. Every time she called when it rained I sent a guy over there to help, to fix, to do whatever, but, I mean, we did everything we could.

Q. How many times did the inside of her house get wet?

A. Twice I'm thinking.

Q. Okay.

A. Two rain storms.

Q. What did do you after the first rain storm to keep it from getting wet for the second?

A. What did we do?

Q. What did you do?

A. We re-secured the Tyvek. We -- you know, re-secured the areas where we thought the water may be coming in. I mean, it wasn't to the stage of it was waterproof, it was to the stage of us building a dormer on top of the house and it was still somewhat **vulnerable** to the elements. I mean, you can only do so much to try to weatherproof a house before the windows go in and the siding goes on.

Ex. C at pp. 85-86.

Indeed, there is, at the very least, a question of fact with respect to whether Defendants breached the contract between the parties by failing to protect the Plaintiffs home against water damage by failing to close the roof and walls within a reasonable period of time, as required by the contract:

TABLE

See Contract, Exhibit A to Defendants' Motion at ¶14.

Moreover, there is at least a question of fact with respect to whether Defendants' work conformed to the Contract, where Plaintiff has presented an abundance of evidence that the work was faulty, created a fire hazard, and left the home structurally unsound, as indicated by Mr. Casanova, who had the opportunity to inspect Defendants' work. Indeed, under the parties' contract, Defendants were required to install their work "in a good and workmanlike manner, all so as to pass all building department specifications." Ex. A to Defendants' Motion at ¶17.

However, there is at least a question of fact with respect to whether Defendants committed the first material breach of this provision of the Contract by installing the work in such a manner that rendered the Plaintiffs home unsafe. As Mr. Casanova indicated in his letter, "On September 2008 did walk through of the addition as requested by Ms Ramey. During that walk through there were items that appeared to need corrections. One was the blocking under the micro lam bearing on the east existing exterior wall. The west end of the micro lam also appears to be bearing on the floor sheathing and not transferring the load to the first floor joist. The ceiling in the basement may have to be removed to insure proper blocking under this bearing point. Also it was noticed that the floor trusses had blocking in the middle of the span and they were not bearing at the correct locations. [1] " Ex. E hereto. These issues noted by Mr. Casanova are clearly indications of faulty work, giving rise (at the very least) to a significant issue of fact with respect to whether Defendants' work was up to code.

Furthermore, Plaintiff was certainly not required to keep Defendants on the job when she became aware of Defendants' multiple breaches of contract. When Plaintiff became aware of these breaches, she was excused from any further performance of the contract and was entitled to terminate the agreement. *Michaels v Amway Corp.*, 206 Mich App 644, 650, 522 NW2d 703 (1994).

Moreover, Plaintiff was not required to sit idly by while her home was being ruined by water intrusion and faulty work rendering her home inhabitable. Instead, Plaintiff was entitled to mitigate her damages and did so, by firing Defendants and finding others to make her home structurally safe and secure from the elements. *Lawrence v. Will Darrah & Assoc, Inc,_445* Mich. 1, 15; 516 NW2d 43 (1994) (a plaintiff has a duty to mitigate damages by making efforts that are reasonable under the circumstances to minimize the economic harm caused by the wrongdoer).

Furthermore, Plaintiffs testimony establishes that it was Defendants' work that was faulty, and not the work of any other contractors that she later hired. As Plaintiff testified in her deposition, she was present while the work was being performed by Defendants and their subcontractors, and was an eye witness to the fact that the work they performed was the same work that was later determined to be faulty by Mr. Casanova. Ex. B at pp.70, 76-77, 82-86. Accordingly, Plaintiffs' claims that Defendants' work (and not someone else's) was faulty are not "mere conjecture," but supported by relevant, admissible eyewitness evidence.

Finally, the letter attached as Exhibit A clearly disproves Defendants' theory that Defendants were fired because Plaintiff ran out of money. Indeed, the letter clearly states that Defendants were being fired for multiple breaches, including that Defendants' work had damaged her home, and that they were demanding money that was not yet due under the draw schedule. Accordingly, there are clear issues of fact remaining with respect to Plaintiffs reasons for firing Defendants, and summary disposition of Plaintiffs breach of contract claim is not appropriate.

II. There Are Clear Issues Of Material Fact Remaining With Respect To Whether Defendants Failed Use Plaintiff's Payments To Pay Subcontractors As Required Under the Michigan Builder's Trust Fund Act.

The Michigan Builder's Trust Fund Act ("MBTFA") "imposes a trust on funds paid to contractors and subcontractors for products and services provided under construction contracts." B&C Marble Tile Co, Inc v Multi Bldg Co, Inc, 288 Mich App 576, 583, 794 NW2d 76 (2010). The MBTFA is a remedial statute, designed to protect people of the state from fraud in the construction industry, and thus "it should be construed liberally for the advancement of the remedy. *Id.* To establish a claim under the MBTFA, a plaintiff must show the following elements:

> (1) that the defendant is a contractor or subcontractor engaged in the building construction industry, (2) that the defendant was paid for labor or materials provided on a construction project, (3) that the defendant retained or used those funds, or any part of those funds, (4) that the funds were retained for any purpose other than to first pay laborers, subcontractors, and materialmen, and (5) that the laborers, subcontractors and materialmen were engaged by the defendant to perform labor or furnish material for the specific construction project.

Id.

Here, Defendants argue that they are entitled to summary disposition of Plaintiffs MBTFA claim because Plaintiff has no proof that Defendants failed to pay any subcontractors. However, Plaintiff has provided a signed statement by at least one subcontractor, L&M Royal Air, stating that Defendants failed to pay them and that Plaintiff had done so. Ex. I hereto. Accordingly, there is at least an issue of fact remaining with respect to whether Defendants failed to first pay their subcontractors out of the monies paid to them by Plaintiffs as required under the MBTFA, and Defendants' motion for summary disposition on this claim must therefore be denied.

III. There Is At Least A Question Of Material Fact Remaining With Respect To Whether Defendants' Actions Rise To The Level To Sustain Plaintiffs Intentional And Negligent Infliction Of Emotional Distress Claims, As Well As Her Claims For Exemplary Damages.

Defendants' motion should also be denied because there are at least questions of material fact remaining with respect to whether Defendants' actions in damaging and nearly destroying Plaintiffs' home, leaving herself, her family, and especially her ailing aunt without a safe place to live rises to the level of an intentional or negligent infliction of emotional distress.

Indeed, as Plaintiff testified, Defendants' reckless treatment of her home (which was confirmed by Pesta's callous statement that she wouldn't have been as bothered by the substantial water damage to her home if she had simply left) left her distressed and in the care of a psychologist. Moreover, as Plaintiff testified, she believes that he **elderly** aunt would not have died during the if she had been able to take care of her under her own roof, which was prevented by Defendant's careless treatment of her home. As Plaintiff testified, water was pouring through her recessed lighting and causing the walls, ceilings and paint to bubble and caused mold to grow. Moreover, Defendants' actions left the home structurally unsound, which clearly would cause any reasonable person significant distress. Such actions clearly give rise to a question of fact for the jury to determine whether or not rendering Plaintiffs home an unsafe, mold and water damaged nightmare is sufficiently outrageous to sustain a cause of action for intentional infliction of emotional distress.

Moreover, with respect to Plaintiffs claim for negligent infliction of emotional distress, there is at least a question of fact with respect to whether Plaintiffs family members, including her aunt, were harmed by Defendants' actions. As such, summary disposition with respect to this claim is inappropriate, as well.

Finally, with respect to Plaintiffs' claim for exemplary damages, this is not a cause of action at law, but a request for specific damages. As such, summary disposition of this claim is not appropriate. *See Kozma v Chelsea Lumber Co*, 2010 WL 2836327 (Mich App) at *8.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendant's Motion in its entirety and award Plaintiff her costs and attorney's fees incurred as a result of responding to same.

THE RASOR LAW FIRM, PLLC

<<signature>>

JAMES B. RASOR (P43476)

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Footnotes

1 Mr. Casanova's testimony that some of the work may have been incomplete is not dispositive of whether or not Defendants were in breach of the contract by failing to provide Plaintiff with a safe, well-constructed addition. Instead, such testimony only underscores that there are issues of fact with respect to how defective Defendants' work was at the point when Plaintiff fired Defendants.

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